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Transnational Law.
Approaches and (Commercial) Origins

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Transnational Law.
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Abstract:[1]*Transnational law, hereinafter 'TL', be it a real dream or a dreamed reality, is to be outlined in the light of some approaches and its origins. The paper addresses 3 (three) approaches of TL: the ideological approach (Section 1), the operative approach in its academic dimension (Section 2), respectively the operative approach in its non-academic and practical approach (Section 3). Furthermore, the paper addresses the private (and) commercial origins of TL (Section 4). In the first quarter of the 21st century, TL deployed its evolutionary nature. In order to deeply contemplate in future papers the stages of such TL's evolutionary nature, the paper is suggesting for the time being a 'Back to the origins of TL itself!' demarche. It might be a chance to properly contemplate also in future papers the progressive nature of the transnational normativity itself, be it hard or soft. Such latter nature is permanently nurtured by the relationships evolved within the so-called 'world society'. At least in the last 50-60 years, the world society detached the nations from the States themselves and from the Westphalian logic familiar with the nation-States only. The final remarks allow seeing, even briefly, that the newest TL, if any, amounts, at least in its commercial dimension, to TL in its oldest version of commercial dimension itself (Section 5). The so-called 'circle, if any, of TL' in its commercial dimension is fully and perfectly closed; the newest and the oldest* ***lex mercatoria*** *are sharing*

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[1] This research paper constitutes an extended version of the lecture delivered on November 27, 2020, under the auspices of the Centre for Studies in International and Transnational Law (University of Bucharest).

the same core idea - that is the worldwide merchant's common sense in doing business.

Key-words: *transnational (and) commercial law; legal curricula; world society*

1. Ideological Approach

We are today in an important sense all trans-nationalists.[1] Let us say it straight: in the first quarter of the 21st century we were becoming (almost) all trans-nationalists irrespective of the fact that the legal scholars all over the world were becoming or not aware of the transnationalism itself. As far as I am concerned, I modestly suggest to have become (more) aware of the existence of the nowadays transnationalism. That is why I took my academic liberty to approach this topic in the below three dimensions, including the origins of TL itself. It is far from me the idea on the doctrinal need, if any, to spread or to limit the idea and/or the reality of transnationalism. I approach transnationalism in the light of a particular objectivity insofar my intellectual skills allow me to objectively and scholarly behave. Otherwise speaking, my paper's aim is neither to state that transnationalism is good or less good or even bad, nor to convince somebody that transnationalism constitutes the start and the end of the approach, be it legal or not, of the nowadays realities. I humbly dare state that transnationalism can be assessed as a particular stage in the history of the legal thinking. The history as best professor for the whole mankind shall 'decide' the fate of internationalism, or of transnationalism, or of nationalism in legal thinking. As scholars, we must assume the academic mission in order to objectively assess and not to subjectively blame or to subjectively praise the stages of the legal thinking.

Subsequently to the end of the Cold War and at least in the first quarter of the 21st century, we are not living (anymore) in the light of the so-called 'Westphalian duo'.[2] Let us recall that 'the Peace of Westphalia legitimated

[1] My words paraphrase '(…) We are in an important sense all comparatists now'. See William Twining, "Montesquieu Lecture(s)" 30-31, in Peer Zumbansen, "Why Global Law is Transnational: Remarks on the Symposium around William Twinning's Montesquieu Lecture", *Transnational Legal Theory* vol. 4 no. 4 (2013), pp. 463-475.

[2] In the light of the Peace of Westphalia (1648), two main kinds of legal ordering fully emerged, as follows: municipal State(s) law(s), on the one hand, and public international law, on the other hand. In its traditional dimension, public international law has been conceived as ordering the relations between States only. See William Twining, "Globalisation and Legal Scholarship"*, Tilburg Law Lectures Series, Montesquieu seminars volume 4 (2009*), published by Wolf Legal Publishers in close cooperation with the Tilburg Graduate School of the Tilburg University Faculty of Law, Netherlands, 2009, pp.37-38. In 2003, the author suggested a "Post-Westphalian Conception of Law" in *Law & Society Review*, volume 37, issue 1, pp. 199-258.

the right of sovereigns (of States, my note) to govern their people of outside interference (….). The treaties of Westphalia enthroned and sanctified sovereigns (States, my note), gave them powers domestically and independence externally'.[1] In the light of the Westphalian model, transnational situations[2] involved only the States as classic subjects of international law. The logic of such model had been conceived as being purely territorial. The sovereign States performed various cross-borders activities in their capacity of the sole (or the main, my note) actors of international law. In order to deal with such situations involving the States themselves and their citizens, the (nation-)States used the devices of the international law. Let us also recall that, under the positivist approach in international law, J. Bentham coined the term 'inter-national' law in 1789.

After the Second World War, it had been undeniably seen that several transnational situations involved not only States, but also 'individuals, corporations (…), corporation of States, or other groups'.[3] These transnational situations amount to the Post-Westphalian Age where States equally co-exist beyond their borders not only with States but also with individuals or other groups; we are fully experiencing today the advantages and the flaws of the Post-Westphalian Age. Anyway, this latter Age requires a legal field, or a legal tool, or a methodological device to be used in order to properly deal with such transnational situations. In the '30s and 50s, Professor Georges Scelle suggested the usefulness of the so-called '*droit des gens'*; Professor Alf Ross suggested the usefulness of the '*interlegal law'* that seemed to be an expanded (private) international law.[4] Professor Philip C. Jessup felt himself not encouraged to use the concepts of 'international'

[1] See Mark Janis, "Sovereignty and International Law: Hobbes and Grotius", in Ronald St. John Macdonald (ed.), *Essays in Honour of Wang Tieya* (1994) 391, 393. This author is quoted by Stéphanie Beaulac, "The Westphalian Model in defining International Law: Challenging the Myth", 8 *Australian Journal of Legal History* vol. 8 (2004), pp. 181-213, available at SSRN: https://ssrn.com/abstract=672241, last visited on 20 December 2020. The other two primary elements of the Peace of Westphalia (1648) are amounting to wider formal religious freedom and to the introduction of the diplomatic profession. See Steve Patton (2019), "The Peace of Westphalia and it Affects on International Relations, Diplomacy and Foreign Policy", in *The Histories,* vol.10:iss.1, article 5, available at https://digitalcommons.lasalle.edu/the_histories_/vol10/iss1/5, last visited on 20 December 2020. See also Leo Gross, "The Peace of Westphalia, 1648-1948", *The American Journal of International Law,* vol. 42, no. 1 (January 1948), pp.20-41.

[2] I call 'transnational situation' any situation that transcends and/or permeates the territorial borders of any nation-State.

[3] See Philip C. Jessup, *Transnational Law,* Yale University Press, New Haven, 1956, p.3.

[4] In the '80s, the scholars on the topic of global legal pluralism employ the concept of 'interlegality' to depict the interactions between different legal orders. For instance, Boaventura de Sousa Santos, "Law: A Map of Misreading Towards a Postmodern Conception of Law", *J.L. & SOC'Y* vol. 14(1987) pp. 279, 288, 298. The latter author is quoted by Ralf Michaels, "The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge From Global Legal Pluralism", *Wayne Law Review* vol. 51 (2005), pp.1209-1259.

and/or 'international law' for at least one reason: 'international' is misleading since it suggests that one is concerned with the relations of one nation (or State) to other nations (or States) (…) just as the word 'international' is inadequate to describe the problem (the international problem, my note), so the term 'international' will not do'.[1]

Therefore, Professor Jessup initiated an academic quest with a view to find a more suitable (and subtle, my note) regulatory framework to place any transnational problem[2] arising out of any transnational situation. This scholar employed the notion of 'TL'; 'TL (…) includes all law which regulates actions or events that transcend national frontiers'. It should be reminded that, prior to professor Jessup but also in the 1950s, C. Wilfred Jenks contemplated TL as a particular body or field of law.[3] It should be also reminded that Professor Jessup did not coin either the adjective 'transnational', nor the term of TL; Professor Jessup acknowledges that the 'transnational' has been borrowed from some previous writings/addresses, e.g., from the writings/addresses of Myres McDougal, Joseph E. Johnson, Percy Elwood Corbett, Arthur Nussbaum.[4] In other words, the notion 'transnational', respectively the term 'TL', became worldwide famous under Jessup's ideas notwithstanding the previous employments of such notion and term by the scholars of the 1950s. Such regulatory framework amounted, at a first glance, to a new field and/or discipline and/or body of law - that is 'TL'. I stated 'at a first glance' for at least one reason: as already pointed out, Professor Jessup assessed international, in its both public and (implicitly) private dimensions, as constitutive part of TL. Undoubtfully, international law is a legal discipline; therefore, TL itself might be assessed as a (new) field and/or discipline and/or body of law. Notwithstanding, it shall be never forgotten

[1] See Philip C. Jessup, *supra* note 4 at page 2, pp.1-2.

[2] For the purpose of this article, I call 'transnational problem' any problem that cross-border and/or permeates the territorial borders of any nation-State, respectively that involves that nation-State and/or other nation-States, and/or individuals, corporations or groups of nation-States. Such transnational problem arises out of any transnational situation, as defined *supra* note 3 on the previous page.

[3] I stated previously this point in one of my papers. See Radu Bogdan Bobei, "Preliminary focus on the various meanings of the term 'transnational law'", in *Romanian Journal of International Law*, vol. 1, 2020, pp. 7-45. My previous paper also pointed out that, prior to Professor Jessup, the term 'TL' had been employed by Ernst Rabel and Max Gutzwiller. Maybe it is useful to recall that the idea of TL has been suggested by Wilfred Jenk in the light of the labour law relations. Not surprisingly, Peer Zumbansen approaches today, in the light of TL, the interplay, if any, between the domains of corporate governance and labour law. See Peer Zumbansen, "The Parallel Worlds of Corporate Governance and Labor Law", *Indiana Journal of Global Studies*, vol.13: Iss 1, article 9, available at: http://www.repository.law.indiana.edu/ijgls/vol13/iss1/9, last visited on 20 December 2020 In the light of the case 'Rana Plaza (Bangladesh, 2013)', the so-called 'transnational labour law for global supply chains' is assessed by Peer Zumbansen, "Happy Spells? Constructing and Deconstructing a Private-Law Perspective on Subsidiarity", 79 *Law and Contemporary Problems*, vol. 79 (2016), pp. 215-238, available at: https://scholarship.law.duke.edu/lcp/vol79/iss2/10, last visited on 20 December 2020

[4] See Philip C. Jessup, *Transnational Law,* cited above, p. 2 (footnote no.3).

that Professor Jessup owes his intellectual background to the New Haven School; such doctrinal school of thought assessed international law not as body of rules (discipline or field of law, my note), but as a process of authoritative decision making.[1] In light of these ideas, I advocate to read the 'TL' suggested by Professor Jessup as a *non-territorial process* and not necessarily as body of law that amounts to a new legal field or discipline. For the time being, this is my doctrinal approach, notwithstanding the overwhelming worldwide literature assessing Professor Jessup's TL as body of law (only).[2]

As already pointed out, any transnational situations are very familiar to the Post-Westphalian Age that we are living at least at the beginning of the 21st century. Such Post-Westphalian Age involves not only States, group of States, individuals, corporations etc., but also the presence in a particular social field of more than one legal order; that is the core of the legal pluralism.[3] For instance, in the social field of the European Union, the legal order of European Union itself, the legal orders of the nation-States that are its members and the international legal order exist and co-exist.[4] European Union is to be regarded as a particular and sub-regional organization. Such organization is experiencing the so-called 'sub-regional' version, if any, of TL understood in its dimension amounting to legal pluralism.

TL, be it regarded as worldwide, or regional, or sub-regional way of the legal pluralism's living, drives us to a particular ideological and academic need; that is the need to address properly any transnational situation. It seems that TL, be it legal field or methodological tool and so on, satisfies such ideological need, on the one hand and is fully compatible with the Post-Westphalian logic, on the other hand. Unlike the Westphalian logic based mainly on the territory of the nations-States, the Post-Westphalian logic is

[1] See Harold Hongju Koh, "Why Do Nations Obey International Law?" *The Yale Law Journal*, vol. 106 (1996- 1997), pp. 2599-2659.

[2] See, for instance, the articles published in Peer Zumbansen (ed.), *The Many Lives of Transnational Law. Critical Engagements with Jessup's Bold Proposal,* Cambridge University Press, 2020.

[3] See the seminal article of John Griffiths, "What is Legal Pluralism?", *The Journal of Legal Pluralism and Unofficial Law*, volume 18, 1986, issue 24, pp. 1-55.

[4] The nations-States that are members of the European Union are experiencing the so-called 'shared sovereignty'. Such concept involves 'the engagement of external actors in some of the domestic authority structures of the target State for an indefinite period of time'. Shared sovereignty does not amount to the Westphalian/Vatellian sovereignty whose one core element (the principle of autonomy) is not violated. In other words, the shared sovereignty allows for the violation of the Member States' principle of autonomy. As to the framework of shared sovereignty, see Stephen D. Krasner, "Sharing Sovereignty: New Institutions for Collapsed and Failing States", *International Security*, vol.29, no.2 (Fall 2004), pp. 85-120, published by The MIT Press. See also Stephan D. Krasner, "The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law", *Michigan Journal of International Law* vol. 25, issue 4 (2004), p. 1075, available at: https://repository.law.umich.edu/mjil/vol25/iss4/15 , last visited on 20 December 2020

purely functional. In other words, the logic of the Post-Westphalian model has been conceived as being purely functional; its *rationale* and goals are to determine all the actors of any transnational situation to be (more) functional. TL's purpose provides for a helpful tool to realize a smooth shift from the territorial logic to the functional one. To sum up, the Post-Westphalian Age requires an extension of the Westphalian duo comprising the municipal or domestic laws of the sovereign States and public international law dealing with the relations between such States only.[1] The legal pluralism draws the attention on the topic involving 'an era of complex, multi-level, global governance (and/or normativity and/or *sui generis* normativity, my note), tied together by networks'.[2]

2. Operative Approach. Its Academic Dimension

This paper's first operative goal is to draw the attention to Law Schools all over the world on a specific academic emergency. The source of the latter emergency is not necessarily my wish or my doctrinal view on the topic of legal education. I just ascertain an emergency arising out of the period of my life time; that is the emergency surrounding the idea already spread to enrich, under the aegis of the so-called 'Transnational legal education', the legal curriculum. Such enrichment is provided through a 'Basic Introduction to Transnational Law.[3] What is transnational law? Does it differ from international law? Is there a new field of law arising out of out the realities emerged after the Second World War? Or is it a methodological tool designed to cope with the interdependence between international law and domestic laws irrespective of the territories of the nation-States? A Basic Introduction to Transnational Law might be the path to the scholarly approach of the transnational problems arising out of the situations that are mainly transnational; these situations become frequently 'transnational' because of

[1] As to the use of the term 'Westphalian duo', see Peer Zumbansen, *supra* note 1 at page 1, p. 463. This latter author borrows such term from William Twining, "Normative and Legal Pluralism: A Global Perspective", *Duke Journal of Comparative and International Law*, vol. 20 (2010), p. 473.

[2] See Paul Schiff Berman, "From International Law to Law and Globalization", available at SSRN: https://ssrn.com/abstract=700668, last visited on 20 December 2020

[3] I suggest starting the basic study of TL either at the same time when studying public international law, either before. It has been suggested in 2004 that the study of TL must be 'broadly conceived as an introduction to international law'. See Mathias Reiman, "From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum", *Penn State International Law Review*, vol.22, no. 3, article 3, available at: http://elibrary.law.psilr/vol22/iss3/3, last visited on 20 December 2020. I had already briefly addressed the topic 'TL and legal education' in one of my previous paper. See Radu Bogdan Bobei, "Preliminary focus on the various meanings of the term 'transnational law'", cited above, pp. 7-45.

the evolving interdependence between public and private actors acting cross-border altogether.

There is another key-question: 'Are there some origins of TL?' Certainly there are some such origins. This paper's second operative goal is to introduce the reader to the origin(s) of TL. The future lawyer (and former student, my note) must know and understand these origins. In light of such understanding, if any, the chance for the future lawyer to understand the TL's evolutionary nature might occur. The never ending evolutionary nature of the TL itself finds its roots in the never ending (or maybe ending, my note) nature of the so-called 'world society'.

To sum up, in 1956 Professor Jessup introduced the international lawyers (former students from the 1950s, my note) to the reality arising out of TL itself. As of 2020, the professors of law must introduce transnational students to TL and to its evolving nature. As suggested by this paper's title, I am going to mainly approach only the origins of TL. Its evolutive nature might be the core idea of my future research papers.

3. Operative Approach. Its Non-academic and Practical Dimension

Is there a need for any international lawyer to become a transnational one? As long as the Post-Westphalian Age lasts, certainly it is. What does it mean 'transnational lawyer'? What does it mean 'international lawyer'? It is less appropriate to conceptualize either the 'international' or 'transnational' lawyer. I suggest not focusing on definitions, if any. I would instead suggest focusing on what is actually doing either the 'international' or the 'transnational' lawyer.

The international lawyer deals with the legal problems that are logically international by nature. For instance, the legal problems arising out of the relationships between States or organizations of States require the legal advice of an international lawyer; that is the lawyer whose expertise focuses on the (public) international law issues only. Unlike the international lawyer, the transnational lawyer logically deals with transnational legal issues only. Any legal issue is transnational by nature if it involves the approaches familiar to public and private law issues altogether, respectively the approaches familiar to international and domestic law altogether. Furthermore, any legal issue is also transnational if it involves public and private actors altogether, if such distinction (public/private actors) still exists or even substantially ever existed. For instance, the legal issues arising out of the relationships between public actors (e.g., States, organizations of States) acting either *jure gestionis* or *jure imperii* and their private counterparts (individuals or corporations)

acting *jure gestionis* only are hybrid by nature and require the legal advice of a particular lawyer. This is the transnational lawyer, whose expertise focuses on the public and private international law rules altogether and on any other rules, be it or not normative by nature; these rules address logically any transnational issues arising out of any transnational situation. In other words, the clients need the legal advice of transnational (public law) lawyers in the following cases: the aforementioned public actors acting *jure imperii* are entering contractual relationships with private actors that are logically acting *jure gestionis* only, in the light of a treaty; the clients need the legal advice of transnational (private law) lawyers when the aforementioned public actors acting *jure gestionis* are entering contractual relationships with private actors that are logically acting *jure gestionis* only, in the absence of any treaty concluded by those public actors and the State that the private actors are belonging to. All such ideas are going to be briefly reminded maybe one more time throughout this paper.

A human rights case requires the expertise of a transnational lawyer who is able to manage the interplay between international law and domestic law, or/and the interplay between public actors (States) and the private actors (the individuals) that are directly suing the States.

Furthermore, an investment case is purely transnational when the investor-State dispute is not resolved by diplomatic means; an investment case is a purely international case when the same dispute is solved between the States by diplomatic protection or by war. Any investment case requires the expertise of a transnational lawyer who is able to manage – as to the applicable law for instance, the interplay, if any, between the law of the Contracting State and the rules of international law as may be applicable.[1] In other words, a typical transnational (investment) dispute involves public and private legal issues altogether, State or/and States, corporation and/or individual investor. The mixture of legal issues and actors performing business activities requires and involves a particular legal framework which is also a mixture of rules (domestic/international, public/private rules). The legal mixture arises when in a particular investment dispute Romanian law, Swiss law, English law and international public law, for instance, are to be applied altogether. To sum up, any investment case might be assessed as an expression of the Post-Westphalian Age that we are living today. The aforementioned reasoning proves its availability in any other transnational case, be it or not investment dispute, respectively human rights dispute.

[1] See, for instance, art. 42 of the Convention on the Settlement of Investment Disputes between States and National of Other States, hereinafter 'ICSID Convention (1965)'.

For the time being, the legal mind of the students and of (future) lawyers is fully divided. The division arises out of the way of law teaching in Law Schools. The law teaching is firmly divided in public law and private law, domestic law and international law, *hard* law and *soft* law and so on. The law teacher of our days (still) direct the mind of the students towards the firm and strict distinction between public (domestic) actors and private (domestic) actors, respectively between public (international) actors and private (international) actors and so on. The profound interaction between such legal domains and actors is taught in a way to remind that only States or mainly States are dealing with cross-border situations. The latter idea and the aforementioned strict and firm division amount to the Westphalian logic only.

Today, the Post-Westphalian logic extents to other ideas.

Firstly, the interaction is more profound in a way that the individuals and or/corporations are not anymore the objects of international law. They were becoming full (even primary, my note) subjects of international law.[1]

Secondly, when the States, individuals and corporations are assessed as actors of international law in a particular hierarchical way, we are still remaining in the area of the international law itself. In the light of such hierarchical way, individuals and corporations are called 'secondary actors of international law'. The secondary actors cannot directly sue the States. Only the States that the secondary actors belong to, can sue by way of diplomatic protection other States on behalf of the secondary actors themselves; in other words, the latter actors must appellate to their States in order to obtain the satisfaction of their claims against other States. When the States, individuals and corporations are assessed in the so-called 'horizontal way', we are in the area of TL itself. Under the 'umbrella' of TL, the secondary actors become, let's say it straight, primary actors of international law; consequently, the 'new' primary actors of international law can directly sue the States without the help of their State(s) exercising the diplomatic protection. Such possibility exists because of the contemporaneous horizontalization of all subjects of international law, be they States, organizations of States, individuals, corporations and so on. The so-called 'horizontalization' fully helps the former secondary actors of international law; that is mainly the individuals and/or corporations acting cross-border(s). As already stated, they do not need anymore any diplomatic protection of 'their' States to sue other States.

[1] Professor Jessup agreed with Professor Scelle 'that States are not the only subjects of international law', on the one hand; on the other hand, Professor Jessup did not agree with the French Professor 'that the individuals are the only subjects' of the international law. See Philip C. Jessup, *Transnational Law*, cited above, p. 3.

The aforementioned profound interaction suggests, at least in its 'horizontal' dimension, that the Post-Westphalian logic continues its road and blurs up the strict and firm division between the public/private law, international/domestic law, public law and private law actors. In any transnational situation, such division becomes inevitably less strict and firm. It is difficult - almost impossible - for any student and lawyer to successfully deal with any transnational situation if it remains educated in the light of the aforementioned strict and firm divisions that are very familiar to the Westphalian logic.[1] As already pointed out, the Post-Westphalian logic, which permeates our lives in the first quarter of the 21st century, involves a never-ending cross-border interaction between public and private actors and their activities, respectively between public and private rules.[2] Such cross-border interaction is a fact, even an undeniable fact. Therefore, any international lawyer must become, in some instances, a transnational one. The private (and) commercial origin of TL might help him understand TL and its structural availability. The latter availability amounts to a sort of evolutionary nature of TL itself; scholars all over the word lively described the latter nature in the last period of time.

4. The Private (and) Commercial Origins of TL

In the 1950s, Professor Jessup (mainly) framed TL in the dimension familiar to (public) international law. The universality of the human problems, the power to deal with the human problems, the choice of law governing the human problems have been, therefore, contemplated through the lens of (public) international law only. In other words, Professor Jessup's

[1] The international legal order arising out the Peace of Westphalia was 'based on sovereign, independent, territorially defined States who tried to maintain political independence and territorial integrity'. It is easy to notice that the Westphalian system of international law was based on the system of sovereign States. In the light of such core idea of the Westphalian system, the Permanent Court of International Justice ruled in the 1927 *S.S. Lotus Case*: 'International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims'. See Edith Brown Weiss, "The Rise or the Fall of International Law?", *Fordham Law Review*, vol .69 (2000), p. 345 available at: https://ir.lawnet.fordham.edu/flr/vol69/iss2/2, last visited on 20 December 2020. See also William Tinning, "Globalisation and Legal Scholarship" and M.S. Janis, "Sovereignty and International Law", both cited above. Last, but not least, it has been suggested to assess the Peace of Westphalia (1648) as 'the advent of traditional international law based on principles of territoriality and state autonomy'. See Harold Hongju Koh, "Why Do Nations Obey International Law?", cited above, p. 2607.

[2] It seems that the international legal order arising out the Post-Westphalian Age framed the concept of the nation-market or of the State-market. It also seems that the Post-Westphalian Age regards the concept of 'nation-state' as political vestige. I dare to state that notwithstanding the fact that the Post-Westphalian Age amounts to a universal dimension, not all the States are enjoying the peculiarities of such Age. This idea could be developed on the occasion of drafting future research papers.

premonitory ideas on TL mainly amounted to the investment (and) public level of international law encompassing the public and private actors' cross-borders activities. Especially after the Second World War, the business community employed the methods of TL in order to expand its private (and) commercial activities all over the world. Consequently, such community mainly attached to TL various private and purely commercial goals. I dare to state that we are living today in the middle of the medieval origins of TL; such medieval origins are purely private and commercial. *In other words, the medieval birth of TL is purely private and commercial.*

I am going to point out that the so-called 'transnational commercial law' - that is the (old) *lex mercatoria*[1] - constitutes the first idea of transnationalism drafted by human beings (the medieval merchants themselves). It should be noted that the medieval (old) *lex mercatoria* was transnational in the exclusive meaning that the merchants' activities were developed beyond the territories where the local medieval sovereigns - to whom those merchants belonged to - exercised and exerted their political power; such territories are going to constitute, at least in Europe, one main element of the organization of the future European nation-States. Under that meaning, the medieval 'transnational' equates the meaning of the future positivist term 'inter-national'; in other words, the so-called 'medieval law of merchants' is to be assessed as transnational because it is purely cross-border, as it develops beyond the territories of the local medieval sovereigns. Furthermore, I am also going to not neglect certain issues regarding the (new) *lex mercatoria* evolving mainly after the Second World War. I am doing that because the

[1] There is also a new *lex mercatoria* arising out vigorously after the Second World War. The new version of *lex mercatoria* encompasses the practices and principles governing international business transactions and greatly influences the international commercial arbitration proceedings, be they *ad hoc* or institutional. See Francesco Galgano, "The New Lex Mercatoria", *Ann. Surv. INT'L & COMP.L.* vol. 2 (1995) p. 99 and Friedrich Juenger, "The Lex Mercatoria and Private International Law", *Louisiana Law Review,* vol. 60, no. 4 (2000), p. 1133. These latter authors are also quoted by Mathias Reiman, "From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum", cited above, p. 45 (footnote 21). The decline of the nation-States is followed by the rise of the markets. The primacy, if any, of the markets is embedded 'in the idea of a new *lex mercatoria* (law merchant), a transnational body of substantive rules created not by States but by the needs and practices of commerce and applied by international (commercial, my note) arbitration'. See Ralf Michaels, Nils Jansen, "Private Law Beyond the State? Europenization, Globalization, Privatization", *The American Journal of Comparative Law*, volume 54, number 4 (fall 2006), pp. 843-890. It should be reminded that Lord Mansfield, the father of the (old) law merchant, introduced comity into English law. See Joel R. Paul, "The Transformation of International Comity", *Law and Contemporary Problems,* vol. 71 (Summer 2008), p. 19-38, available at: https://scholarship.law.duke.edu/lcp/vol17/iss3/2, last visited on 20 December 2020.

nowadays liberal-internationalists lawyers[1] are usually employing the devices of the truly liberal-internationalist (legal/non-legal) framework; such framework un-doubtfully encompasses and even develops itself around the (new) *lex mercatoria*.

First of all, I am going to address the ***oldest*** *lex mercatoria* as pointed out even implicitly by the Roman jurists. This version of *lex mercatoria* constitutes the first idea of transnationalism 'drafted' by the human reason only. The ***oldest*** *lex mercatoria* was transnational in the exclusive meaning also that the Roman and foreign merchants' activities were developed beyond the territory of each Roman Empire's province. The private (and) commercial origins of the ***oldest*** *lex mercatoria* amount to the *jus gentium.* In other words, unlike the medieval TL's birth, *the pre-medieval birth of TL is not purely private (and) commercial; it amounts also to the patterns of the jus gentium* (the truly ancestor of the future positivist international law).

The novelty provided by my paper consists of the contemplation of three versions of *lex mercatoria*: the ***oldest,*** the *old* and the *new lex mercatoria.* The latter two versions are the ones most addressed by the doctrine worldwide. The ***oldest*** one is almost forgotten. We are going to see that the ***oldest*** *lex mercatoria* is a truly constitutive part of the *jus gentium* (the truly ancestor of the future positivist international law).

For the time being, I am just slightly contemplating another idea. In the light of the worldwide development, if any, of the neo-liberal doctrinal ideology, a fourth version of the *lex mercatoria* might arise*;* that is the (possible) **newest** *lex mercatoria*. Such latter version amounts to the re-rise of the merchants' truly common sense. In light of their business common sense, the merchants do not anymore need either their trade practices or usages, or international (and) commercial positivist law, respectively domestic (and) positivist private laws (including commercial law, my note) regulating their cross-border activities; the domestic (and) private laws display specific cross-border dimensions. The core of such displaying involves the idea that such laws regulate cross-border activities in the light of the 'nationalized' conflict of laws rules. The merchants' common sense can cause the fall of the positivist

[1] The so-called 'progressive' side of the liberal-internationalist lawyers sustains and/or recognizes that 'the (public) law or (private) law realm were two sides of the same coin of contractual governance'. See Lester M. Salamon, "The New Governance and the Tools of Public Action: An Introduction", *Fordham Urb. Law Journal* vol. 28 (2001), p. 1611; Carol Harlow, "'Public' and 'Private' Law: Definition without Distinction"*, Mod. Law Review*, vol. 43 (1980), pp. 241, 249. Both latter authors are quoted by Peer Zumbansen, "Law after the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law", *Comparative Research in Law & Political Economy,* Research Paper No. 13/2008, footnote 2010 at p. 35, available at http://digitalcommons.osgoode.yorku.ca/clpe/187, last visited on 20 December 2020.

hard and *soft* commercial positivist law (including trade practices and usages 'listed' by inter-governmental, or international organizations, or non-governmental organizations). In other words, the ***newest*** *law mercatoria*, as not yet here, or never to come, suggests the return of the neo-liberal merchants to the Age of worldwide non-law; the latter non-law amounts to the merchants' human reason itself. Such non-commercial and cross-border 'law' reminds us of one of the constitutive parts of the *jus gentium*; that is the ***oldest*** *lex mercatoria* governing the business contracts concluded by the Roman merchants and foreign merchants, and whose effects occurred beyond the territory of each Roman Empire's province. I recommend to focus on such reminder in the light of the idea that some Roman jurists and philosophers (*e.g.*, Cicero) mixed the *jus gentium* and the 'law' of the nature (the natural law itself). Anyway, the drawing of the so-called 'magic circle' of *lex mercatoria* - encompassing the ***oldest***, the *old,* the *new* and the *newest* one version - can be fully closed and/or ended.

Not very long time ago, it had been doctrinally stated that the 'law of nations' (*jus gentium*) encompassed natural law, rules of mercantile and maritime law concerning private transactions and the rules concerning (public, my note) transactions between sovereigns (be they medieval political structures and later future sovereign States, my note),[1] exerting the political authority over their territories. The latter type of rules amounts to the future concept of 'rules of inter-national law'. As already pointed out, the notion of 'inter-national' had been coined by Jeremy Bentham in 1789; the same notion has been largely adopted by the later positivist theory of international law. The rules governing those transactions are inter-national (and also trans-national) by nature because they are operating cross-border, respectively beyond the territories of the sovereigns themselves. In other words, the notions of 'inter-national' and 'trans-national' are synonyms in the case of the (public, my note) transactions made by the medieval sovereigns and later by the sovereign States.

[1] See Harold J. Berman, "World Law", Fordham International Law Journal vol. 18 (1994), p. 1617, available at: https://ir.lawnet.fordham.edu/ilj/vol18.iss5/4, last visited on 20 December 2020. This author suggests that even the term 'transnational law' is misleading because it does not properly encompasses the interactions within the emerging world society; furthermore, the word 'transnational' refers back to the era of sovereign national States (…)'. Therefore, Harold J. Berman suggested that the term 'transnational law' might be replaced by the concept of 'world law'. The doctrinal statement of professor H. Jolowicz drafted in the 1950s should not be neglected: '(…) the *jus gentium,* the origin of international law, which applied to all persons, Roman or foreign, generally governed commercial relations (…)'. See Herbert Felix Jolowicz, "Roman Foundations of Modern Law", pp. 38-39, as quoted by Joel R. Paul, "The Isolation of Private International Law", 7 *Wisconsin International Law Journal*, vol. 7 (1988), p. 149, available at: http://repository.uchastings.edu/faculty_scholarship/630, last visited on 20 December 2020.

The second abovementioned type of rules amounts not to the *old* but to the ***oldest*** *lex mercatoria*. As already pointed out, the ***oldest*** *lex mercatoria* logically addressed the business (commercial, my note) activities developed by Roman and foreign merchants beyond the territory of each Roman Empire's province. Furthermore, the ***oldest*** *lex mercatoria* logically operated cross-border the provinces of the Roman Empire. The ***oldest*** *(and pre-medieval) lex mercatoria* had been not the 'product' of the human (Roman, my note) mind, but of the human nature itself. It is truly impossible to attach the latter nature to the citizens of only any empire, be it or not the Roman one, or to the citizens, if any, living outside any empire, or to the 'citizens' living outside the global empire, if any, or to the foreigners. The human nature is logically attached to the human beings irrespective of their political and legal attachment to any kind of empire. I would recall the abovementioned idea: *the pre-medieval birth of TL is not purely private (and) commercial; it amounts also to the patterns of the jus gentium* (the truly ancestor of the future positivist international law). And I recall also that *jus gentium* that the Romans dreamed of had been structured and fragmented in the aforementioned three constitutive elements; the pre-medieval transnational commercial law, hereinafter 'p-m TcL', governing cross borders transactions concluded by Romans and the foreign merchants, was one of these constitutive elements. It is easy to notice that the ancestor (the *jus gentium* itself) of the future positivist international laws 'lived', at least pursuant to the Romans' view, in a fragmented way. I simply take note of such fragmentated life of the *jus gentium*. Today, the fragmentation of (positivist, my note) international law caused the so-called 'postmodern anxieties'.[1]

The core idea of the latter fragmentation is deeply linked, in my view, to the 'privatization' of international law itself;[2] 'privatization' often involves 'the replacement of formally legislated State law at the international level by a contractual law created by international (even private, my note) actors themselves'[3] under the aegis of inter-governmental and international organizations. In other words, 'international law is becoming privatized in the sense that individuals are agents and subjects of international law';

[1] See Martti Koskenniemi, Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties", *Leiden Journal of International Law*, vol. 15 (2002), pp. 553-579.

[2] The 'privatization' covered also the (domestic) private laws enacted by the nation-states. The main actors of such 'privatization' are NGOs, multinational corporations and individuals. In the light of this sui generis development- that is the 'privatization of private laws', the so-called 'transnational legal science' and the privately created orders fully emerged in the arena. See Ralf Michaels, Nils Jansen, "Private Law Beyond the State? Europenization, Globalization, Privatization", cited above, pp. 868-871.

[3] See Eric Loquin, Laurence Ravillon, "La volonté des operateurs vecteur d'un droit mondialisé", in Eric Loquin & Catherine Kessedjian (eds.), *La mondialisation du droit*, Paris, Litec, 2000, pp. 91-132.

furthermore, the individuals from nowadays challenge, under the umbrella of the so-called 'multinational corporations and parastatal enterprises', the 'distinctions of public and private transactions'.[1] This idea - that individuals are not anymore, at least after the Second World War, objects but subjects of international law - had been previously stated by Professor Jessup in its seminal Storrs Lecture called 'Transnational Law' (1956). It should be reminded that 'the judgments of the Tokyo and Nuremberg denied the idea that international law is for States only'.[2] The fragmentation of positivist international law notwithstanding 'liberalism and globalization did not bring about coherence, to the contrary' as famous Professor Koskenniemi and (former) Assistant Professor Leino put it; such incoherence finds its goal by replacing 'the structure provided by the East-West confrontation with a kaleidoscopic reality'.[3]

In my (in)famous vision, the fragmentation of positivist international law does not necessarily amount to post-modern anxieties. I state that for at least one reason: TL understood this time only as methodological device is able to manage the so-called 'horizontal way' of the international law's way of nowadays living.[4] Otherwise speaking, the incoherence, if any, brought by various fragments of positivist international law (*e.g.,* commercial fragment, investment fragment, human rights fragments and so on) can become coherence in light of a particular methodological device; that is TL itself, which professors of international law, including Professor Koskenniemi, can

[1] See Joel R. Paul, "Holding Multinational Corporations Responsible under International Law", Hastings International Law & Comparative Law Review, vol. 24 (2001), p. 285, available at https://repository.uchastings.edu/faculty_schlarship/623, last visited on 20 December 2020. See also Joel R. Paul, "The Isolation of Private International Law", cited above, p. 149.

[2] See Harold Hongju Koh, "Why Do Nations Obey International Law", cited above, p. 2615 (footnote 64).

[3] This (incoherent, my note) kaleidoscopic reality enables the competing (public mainly, my note) actors to struggle in order to create 'competing normative systems often expressly to escape from the structures of diplomatic law - though perhaps more often in blissful ignorance about it'. See Martti Koskenniemi, Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties", cited above, p. 559. The authors recall the case of the World Trade Organization and even quote Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?"*, American journal of International Law*, vol. 95 (2001), p. 538.

[4] In light of such international law's horizontal way of living, individuals, corporations - true actors of international law - can directly sue the States. Such private actors can do so because so-called 'vertical' hierarchy between States and the other subjects of international law itself has been eradicated. the case of public investment disputes is relevant: it is not anymore necessary that States bring disputes on behalf of their investors through the employment of diplomatic protection. Therefore, their investors do not need anymore the help of their States to sue the so-called 'receiving States' (the States where the investments are made, my note). In other words, there is no hierarchy between States and individuals, respectively between States and multinational corporations under the ICSID Convention (1965). See Florian Grisel, "Transnational Law in Context. The relevance of Jessup's Analysis for the Study of 'International' Arbitration", in Peer Zumbansen (ed.), *The Many Lives of Transnational Law. Critical Engagements with Jessup's Bold Proposal,* cited above, pp. 186-196.

use to put order in the kaleidoscopic world of current international law. Furthermore, the fragmentation of positivist international law does not frighten me because of the short life of international law in its positivist version. Prior to the so-called 'positivist account' of international law, the non-positivism reality of international law emerged and evolved.[1] Such reality had been framed in the patterns of the *jus gentium* living in fragmented ways. The 'history' of *jus gentium* living fragmented is longer than the history of the positivist international law living, at least after the Second Word War, in a fragmented way.

The fragmentation of the *jus gentium* (the truly ancestor of the future positivist international law) did not damage *jus gentium* itself. Such ancestor thrived in the past ages. It thrives also today because of the way in which the fragmentation of the positivist international law works. Professor Koskenniemi reminded us that such fragmentation involves a 'diluted normativity through *jus cogens* and *soft law'*; the fragmentation involves also the replacement of 'formal (international) legislation by informal normative (international, my note) practice'[2] and, I dare to add, by informal normative 'legislation'. Nonetheless, the informality of the new fragmented positivist international law does not constitute properly speaking a failure of the international law itself. It is not a true failure because such informality reminds us of the *jus gentium* that is … informal by its very nature. Therefore, the fragmentation of positivist international law - that is not properly managed by TL -, drives us to the informality as designed by the *jus gentium* - the truly ancestor of positivist international law itself. The star of *jus gentium* is shining again in the post-post-modern age that we are living today. 'Post-post-modern Age' means the return to the pre-modern Age of the international law's stage; that is the stage of the *jus gentium.* Post-modern anxieties are becoming post-post-modern serenities familiar to the *jus gentium* only, even implicitly reloaded.

In my, maybe this time famous, vision, the aforesaid second type of rules[3] extents to the roots of the transnational medieval legal framework, that is, the roots of the medieval transnational commercial law, hereinafter 'mTcL'. Such framework is trans-national because it addresses the cross-border private and commercial transactions deployed by the merchants. This time also the

[1] As to the idea that positivism is more a methodology than a theory, see Alex Mills, "The Private History of International Law"*, International and Comparative Law Quarterly*, vol. 55, issue 1 (January 2006), pp. 1-50.

[2] See See Martti Koskenniemi, Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties", cited above, p. 559.

[3] The structure of *jus gentium* encompasses natural law, rules of merchant and commercial law and (the future positivist, my note) international law. See Harold J. Berman, "World Law", cited above, p. 1617.

notions of 'inter-national' and 'trans-national' are synonyms. Such synonymy is reached because the merchants (truly private actors) deployed their business beyond the territory they belonged to. We are going to see that, in light of the current investment (public) international law, the meaning of 'trans-national' is not necessarily confined to the nature of the investment activity, which is cross-border by nature. Such meaning is also attached to the fact that a cross-border situation involves different actors that are also different by nature (*e.g.,* States acting *jure imperii,* private and commercial companies, individuals). In other words, any investment international activity is transnational not only because of its cross-border nature but also because of its mixed nature of the actors involved in this activity; furthermore, any investment international activity is also transnational in the meaning that involves rules of different nature (international law be it *hard* or *soft*, domestic laws, religious laws, if any, and so on) governing such activity. To sum up, the aforementioned second type of rules constitute the core of the old law merchant (old *lex mercatoria*, my note) – a truly 'private law based not on any single national law but on mercantile customs generally accepted by trading nations'.[1] As to the first type of rules, it seems that, in the positivist approach, natural law is not law at all.

In the Middle Age, the (old) *lex mercatoria* vigorously thrived despite the lack of any 'codification' of it. Such *sui generis* codification is familiar only to the new *lex mercatoria*. Mainly after the Second World War, the new *lex*

[1] See Harold J. Berman, Colin Kaufman, "The Law of International Commercial Transactions (Lex Mercatoria)", *Harvard International Law Journal*, vol. 19 (1978), pp. 221, 224-29. Unlike the old *lex mercatoria* which is based mainly on mercantile customs, the new *lex mercatoria* is (mainly, my note) based, at least pursuant to some French lawyers and professors, on the general principles of law. See Emmanuel Gaillard, "Transnational Law: A Legal System or a Method of Decision Making?", *Arbitration International*, volume 17, no. 1 (2001), pp. 59-71. This author suggests distinguishing cross-border customs/usages from the general principles of law. Furthermore, the same author recalls an early instance of an award rendered on the basis of general principles of law; that is the award rendered in the case Lena Goldfields Ltd. v. USSR (2 September 1930). This case law has been discussed by Van Vechten Veeder, "The Lena Goldfields Arbitration: The Historical Roots of Three Ideas", *International & Comparative Law Journal*, vol. 47 (1998), p. 747.

mercatoria has been revived;[1] the liberal-internationalist School of thought encouraged this revival under the 'umbrella' of specific *sui generis* lists encompassing general principles of trade laws and/or cross-border usages. The Westphalian logic was afraid of the (old) *lex mercatoria* because of its suggested volatility and autonomy from the sovereign (and territorial, my note) nation-State.[2] That is why such latter logic framed the (new) *lex mercatoria* in the content of various lists (for instance, the List comprising the UNIDROIT Principles of international commercial contracts) amounting to a particular private 'codification', be it *hard* law (international

[1] Jessup's notion of TL revived the doctrinal debates surrounding the rediscovery of the old *lex mercatoria* in the light of the settings familiar to the new *lex mercatoria*. See Antoine Duval, "What Lex Sportiva Tells You about Transnational Law", in Peer Zumbansen (ed.), *The Many Lives of Transnational Law. Critical Engagements with Jessup's Bold Proposal,* cited above, pp. 269-293. 'Codification' has been accomplished either by *hard* law (*e.g.,* international conventions), either by *soft* law means (*e.g.,* model laws, restatement, standard contract forms). The latter type of 'codification' includes, for instance, UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006), or UNIDROIT Principles of International Commercial Contracts. See Daniela Caruso, "Private Law and State-Making in the Age of Globalization"*, New York University Journal of International Law and Politics*, vol. 39, no.1 (2006), Boston Univ. School of Law Working Paper No.06-09, available at SSRN: https://ssrn.com/abstract=900106, last visited on 20 December 2020. Some foreign scholars suggest that (private/commercial law) transnationalism amounts (only) - or simply amounts - to the process of harmonization of the legal systems; such process evolves under the umbrella of international law. See Roy Goode, Herbert Kronke, Ewan McKendrick (eds.), *Transnational Commercial Law. Texts. Cases and Materials,* second edition, Oxford University Press, 2015, pp. 191-214. In my view, such authors are not aware of the core idea familiar to the so-called theory of 'transnational law'; the latter concept does not encompass the commercial area only. Such authors are lacking the openness to see that transnational commercial law is to be distinguished from international trade (or commercial) law; (only) the international trade law logically harmonizes the different legal conceptions in the field of trade law; that is the goal of the international law irrespective of the field (labour law, investment law, human rights law and so on) that we are talking about. The idea of 'transnational, even commercial, law' cannot neglect the ideological core background of TL itself; that is, for instance, to manage the overlapping of different legal orders in the same normative space; or, to manage the overlapping of various actors (public/private) deploying their overlapping activities in the transnational situations. Indeed, some TL's devices – such as specific 'codifications' (*e.g.,* UNIDROIT Principles on international commercial contracts) are harmonizing the general rules of such contracts developed in various legal systems. Such harmonization is to be regarded as a subsequent and recent TL goal; the underlying core idea of TL is not to provide for harmonization. In other words, the initial and core goal of the TL amounts to the efforts developed to successfully fulfil the aforementioned management. My view is to be developed in future work research papers.

[2] Furthermore, the Westphalian logic regarded mainly the (old*) lex mercatoria* as a truly threat. See Bernardo M.Cremades, Steven L.Plehn, "The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions", *B.U. International Law Journal,* vol. 2 (1984), p. 317. As to the field of (public) international law, it has been stated that 'typical matters (of public international law, my note), such us the law of the sea, international boundary disputes, State responsibility for injury to aliens, or use of international rivers, even refer to arbitration, are not considered *lex mercatoria,* because they most obviously depend on 'sensitive political considerations' and require recourse to 'diplomatic skills''. See Covington & Burling LLP, *Public International Law* (2006), available at http://www.cov.com/download/contentbrochures/publicinternationallaw.pdf, last visited on 20 December 2020

conventions) or *soft* law (model commercial laws, commercial restatements, standard commercial contract forms).[1]

In the light of such various and suggested lists, the States, grown up in the spirit of the Westphalian logic, maintained their control over the merchants and their 'laws'. It had been possible to still exert the aforementioned control for the reasons stated below. The lists embodying the (*new*) *lex mercatoria* have been mainly enacted by the States themselves under the aegis of the international inter-governmental (UNIDROIT), or inter-State (United Nations) organizations. Even when such lists have been enacted under the aegis of the international and purely private organizations (International Chamber of Commerce, Paris, hereinafter 'ICC Paris'), the States did not lose their control over the enactment of different versions of the (new) *lex mercatoria*. It should be reminded that States fully, even though implicitly, 'participate' in the quasi-legislative activity of the ICC Paris through the merchants (truly stakeholders of the International Chamber of Commerce) as organized in business associations; these merchants logically 'belong' to those States. In the light of the transnationalism doctrine, the States themselves acting *jure gestionis*[2] are in a full need of the (new) *lex mercatoria* especially when they are acting as such. Under the ICC Paris Rules of arbitration,[3] transnationalism allows the merchants to directly sue the States acting *jure gestionis* in purely commercial business; therefore, the disputes between these States framed as purely commercial actors and their private,

[1] See Sandeep Gopalapan, "The Creation of International Commercial Law: Sovereignty Felled?", *San Diego International Law Journal*, vol. 5 (2004), pp. 267, 396.

[2] *Acta jure gestions* are to be regarded as private and merchant-like, commercial acts and dealings of any government of any State.

[3] At the time of drafting this paper, ICC Paris approved and released the so-called '2021 Rules of Arbitration', hereinafter '2021 ICC Rules', replacing the 2017 ICC Rules of Arbitration, hereinafter '2017 ICC Rules'. The 2021 ICC Rules are scheduled to officially come into force and replace the 2017 ICC Rules on January 1, 2021. The 2021 ICC Rules address and/or update topics related to multi-party arbitrations, party representations, and disclosure of external funding. Furthermore, the 2021 ICC Rules provide for some powers of the ICC Court to appoint all members (of the panels, my note) itself with a view to prevent unequal treatment of the parties, on the one hand, unfairness that may negatively influence the validity of any arbitral award, on the other hand. Indeed, under new paragraph 9 of the Article 12, the ICC Court enjoys the power, in exceptional cases, to appoint each member of the tribunal. Such power might be exercised, I admit, in exceptional situations that are rare by their nature, even if a different parties' method of appointment is envisaged in the content of the arbitration agreement. Furthermore, the rationale of such power amounts to the need of avoiding any appointment method that may seriously affect the validity of any final and binding arbitral award rendered by the panel, as envisaged in the content of the arbitration agreement. For the time being, I modestly suggest to the ICC Court and its stakeholders to reflect more on the last version of paragraph 9 of the Article 12. In commercial settings, arbitration and dealings, the principle of party autonomy should be fully respected. That is not my idea but the core idea of the liberal internationalism that inspired the birth of the ICC Court itself. Therefore, I modestly suggest to the ICC Paris a particular way of behaviour; that is to successfully experience the benefits of the originalism. It worth it!

respectively commercial (business, my note) counterparts (business companies, my note) are also purely commercial disputes.

The (old) *lex mercatoria* should not be regarded only as the first (and humanly created) version of transnationalism.[1] It should also be viewed as a true source of the first privately created legal order. That is the private legal order created by the medieval merchants in order to develop 'their world' across-border(s), irrespective of their, let us say, territorial (even functional, my note) affiliation.[2] The energetic core of the first version of transnationalism was so high that over the time its influence overwhelmed not only the communities of the merchants doing business worldwide. For instance, transnational sport law (*lex sportiva*),[3] transnational construction law *(lex constructionis*),[4] transnational internet law (*lex digitalis*)[5] successfully evolve today their patterns in various transnational communities and settings (the domains of sport, construction and internet etc).

In the Middle Ages and prior to the birth of the Westphalian logic, mainly the territorial approach on law thrived. Multiple political authorities, at least across Europe, enacted multiple laws conflicting with each other. Merchants performed their business activities across multiple European and not European territories. Which law applied to their transactions performed on

[1] For the purpose of my statement, 'transnationalism' shall be mainly understood as it facilitates the coexistence of the (old) *lex mercatoria* and other rules issued by local political authorities on the territories where the merchants (the 'parents' of the (old) *lex mercatoria*) initiated, respectively developed their commercial relationships.

[2] There are also (old) normative orders arising out of privately and religiously created orders such as Sharia (regarded as a modern transnational law), or the Chinese term guanxi. See Richard P. Appelbaum, William L. F. Felstiner, Volker Gessner, *Rules and Networks*, Hart Publishing, 2001. In the area of cross-border diamond trade, the rules and dispute resolutions regulations privately enacted in the area of diamonds industry shall not be neglected. See Lisa Bernstein, "Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry", J. *Legal Studies* vol. 21 no. 1 (1992), p. 115; see also Barak Richman, "How Communities Create Economic Advantage: Jewish Merchants in New York", Law & Soc. Inquiry, vol. 31, no.2 (2006), p. 383. The aforementioned doctrine has been also quoted by Ralf Michaels, Nils Jansen, "Private Law Beyond the State? Europenization, Globalization, Privatization" (footnote 126).

[3] The institutional actors of such transnational privately legal order are FIFA and the Court of Arbitration for Sport. As to the concept of 'non-State authority' in the area of sport, see Franck Latty, "FIFA and Human Rights in Quatar", in Horatia Muir Watt, Lucia Bízíková, Agatha Brandão de Oliveira, Diego P.Fernández Arroyo, *Global Private International Law. Adjudication without frontiers,* Edward Elgar Publishing, 2019, pp.152-160. See also Antoine Duval, "What Lex Sportiva Tells You about Transnational Law", cited above, in Peer Zumbansen (ed.), *The Many Lives of Transnational Law. Critical Engagements with Jessup's Bold Proposal,* cited above, pp. 269-293.

[4] See, for instance, the FIDIC contractual standard forms (General Conditions), be it in its yellow, red or silver version and so on.

[5] See the cases *Yahoo! v. LICRA* and *Microsoft – Ireland* cases. As to the doctrine, see Paul Schiff Berman, "Conflicts of Law and the Challenge of Transnational Data Flows", in Peer Zumbansen (ed.), *The Many Lives of Transnational Law. Critical Engagements with Jessup's Bold Proposal,* cited above, pp. 240-268.

the territories led by different political European and not European authorities? Merchants did not want to enter the Italian scholarly debates of the 12th century amounting to the division of the law in territorial laws and personal laws; the medieval conflict of laws had been mainly resolved in the light of such division. That's why the merchants 'enacted' their transnational (cross-border, my note) 'law'; that is the (old) *lex mercatoria* emerging alongside the plural and various, respectively territorial and personal (mainly religious, my note) laws.[1]

The (old) *lex mercatoria* of the Middle Ages had been based on the mutual trust of merchants. The latter trust amounted to the legitimation of the (old) *lex mercatoria.*[2] The business medieval people stated, even tacitly, their trust with regard the vitality of the (old) *lex mercatoria*. In doing so, the medieval business people mainly employed the cross-border medieval trade customs. The functionality itself as detached from the territorial logic of the Westphalian State constitutes the vitality of this privately created legal order

[1] I recall that the Westphalian approach of law has been based on the division of legal orders in domestic and international. The (old) *lex mercatoria* emerged alongside the national and international legal order; the (old) *lex mercatoria* and the new (and 'institutionalized') *lex mercatoria* have been regarded as 'the idea of the so-called 'tiers droit''. See Alain Pellet, "La lex Mercatoria, Tiers ordre juridique? Remarques ingénues d'un internationaliste de droit public", in *Souveraineté Étatique et Marchés Internationaux à la fin du siècle, Mélanges en l'honneur de Philippe Kahn,* Paris, Litec, 2000, pp. 53-74.

[2] The legitimation of the (new) *lex mercatoria* is connected to/derives from the notions of 'Rough Consensus and Running Code'. See Graf-Peter Calliess, "The Making of Transnational Contract Law", *Indiana Journal of Global Legal Studies*, vol. 14, iss. 2 (2007), article 12, pp. 476 and 479, available at https://www.repository.law.indiana.edu/ijgls/vol14/iss2/12, last visited on 20 December 2020. This author suggests that the (new) *lex mercatoria* 'is conceived as an autonomous legal system beyond the nation-State'. Such new version of transnational private law is based on 2 (two) key-elements: first, the general legal principles amounting 'to the core of national legal systems as explored by functional legal comparison (e.g., the UNIDROIT Principles)'; second, 'the trade customs of international (cross-border, my note) merchants as expressed in standardized contract terms (e.g., the INCOTERMS or model contracts forms of ICC, or of other business organizations, my note)'.

emerged in the domain of cross-border medieval business.[1] Such trust designs the non-territoriality of the first version of transnationalism humanly designed. Otherwise speaking, the (old) *lex mercatoria* has been created and enforced cross-border voluntarily. It has become fully functional irrespective of the territories where the medieval merchants deployed their commercial activities.

In other words, the commercial realities suggest that the communities of merchants, be they from the Middle Ages or from nowadays, are to be mainly, even exclusively, regarded as communities of interest rather than communities of (territorial) places. The communities of interest amount to the so-called 'functional normative spaces' as detached from the notion of territoriality.[2] Such functional normative spaces gave birth to the medieval law merchant (the (old) *lex mercatoria*). The latter 'law' has been originally conceived as a language for imagining the alternative world of the merchants themselves.[3] For instance, one piece of such alternative privately commercial and transnational language is the concept of the bill of exchange. Indeed, in 1842 it had been clarified by way of a specific ruling that 'the bill of exchange rules as deriving from *lex mercatoria* constituted part of the 'general common

[1] 'The notion itself of 'transnational law' designates a non-territorial order, of which the agents of an economic power diffused across the globe are the subjects'. See François Rigaux, *Droit Public et droit privé dans les relations internationales,* Paris, A. Pédone, 1977, as quoted and translated by Antoine Duval, *supra* note 1 at page 13, p. 272. Rigaux assessed TL as law without the State. This idea is similar to the idea of Gunther Teubner*, Global Bukovina: Legal Pluralism in the World-Society* (1996), *Global Law without a State,* Guenther Teubner (ed.), Dartmouth, 1996, pp. 3-28, available at: https://ssrn.com/abstract=896478, last visited on 20 December 2020. Ralf Michaels does not consider so. See for instance his articles published in 2007, 2009, 2010, such as "The True Lex Mercatoria: Law Beyond the State", *Indiana Journal of Global Legal Studies*, vol.1, iss.2, article 11, pp. 447-468, available at: https://www.repository.law.indiana.edu/iggls/vol14/iss2/11, last visited on 20 December 2020; "Global Legal Pluralism", *Annual Review of Law & Science*, vol. 5 (2009), pp. 1-35, and "The Mirage of Non-State Governance", *Utah Law Review* (2010), pp. 31-45. Antoine Duval also reminds us other 2 (two) issues. First, it reminds us that Rigaux proclaimed the existence of 3 (three) legal orders in the following domains: canonical domain, sporting domain and international economic domain. Secondly, it reminds us the work of Berthold Goldman regarding the (new) *lex mercatoria.* The latter author assesses (new) *lex mercatoria* as ''receptacle' for the principles shared among national laws and a 'melting pot' of the specific rules called for by international trade, to international commercial disputes'. See Berthold Goldman, "Frontières du droit et 'lex mercatoria' *", Archives de Philosophie du Droit*, vol. 9 (1964), pp. 177-192.

[2] Any community of interests constitutes the core of any diaspora. See Paul Schiff Berman, "From International Law to Law and Globalization", cited above, pp. 510, 515. In this latter author's vision, the incorporation of social customs and practice (including commercial practice, my note) proves 'the most obvious example of State law's recognition of non-State law-making'. Today, the (new) *lex mercatoria* constitutes a particular and undeniable version of such non-State law-making.

[3] The current global studies firmly suggest, at least in the context related to the topic 'law and globalization', that 'law is not anymore a coercive command of sovereign power, but a language for imagining alternative future worlds'. See Paul Schiff Berman, "From International Law to Law and Globalization", cited above, p. 534.

law' to be interpreted by federal courts sitting in diversity jurisdiction'.[1] The first privately and humanly created legal order - that is the (old) *lex mercatoria* -, finds its roots in the concept of a 'borderless universal trade law of nations (of merchants, my note)'.[2] As already pointed out, the roots of the medieval rules of mercantile and maritime law concerning cross-border private transactions are to be found in the ancestor of the international law - namely the law of nations. It should be reminded that Lord Mansfield, the 'father' of (English) commercial law and Justice Story contemplated the law merchant (the (old) *lex mercatoria*, my note) 'as border-transgressing and as a genuinely denationalized body of law'.[3]

It seems appropriate to suggest a comparison between TL's most recent versions (the old *lex mercatoria* and the new one). We are going to see that these recent versions resemble and differentiate each other. Such comparison shall finally encompass a brief remark regarding the ***oldest*** *lex mercatoria* and the *newest lex mercatoria,* if any.

Firstly, both leges *mercatoria* resemble each other because they are transnational by nature; 'transnational' should be understood in the meaning that the old and the new leges *mercatoria* 'regulate' or address cross-border activities involving private/commercial actors only, including States acting only *jure gestionis*. This is the case of transnational commercial (and private) law. Unlike the old *lex mercatoria*, the new one as emerged after the Second World War began to 'regulate' and/or even address cross-border activities involving private/commercial and public actors altogether. In the light of the treaties, the States acting *jure imperii* began to enter particular commercial/business contracts with private entities. This time, the new *lex mercatoria* became transnational not exclusively because the activities of the actors involved were developed cross-border; such version became

[1] See *Swift v. Tyson,* 41 US (16 Pet.) 1 (1842). This case-law is quoted by Harold Hongju Koh, "Why Transnational Law Matters", *Penn State International Law Review*, vol. 24, no. 4, article 4, available at: http://elibrary.law.psilr/vol24/iss4/4, last visited on 20 December 2020. It seems that this scholar refers only to the (new) *lex mercatoria*. I presume the availability of such idea in the light of (old) *lex mercatoria* also. The aforementioned scholar suggests that 'we need to teach more transnational law, not just transnational legal process, but also transnational legal substance'. Furthermore, Professor Koh suggests the existence of 2 (two) dimensions of the transnational legal substance, hereinafter 'TLS'. There is a private TLS encompassing, for instance, the (new) l*ex mercatoria,* international finance, international banking law, law of cyberspace; there is also a public TLS encompassing, for instance, the law of global democracy, the law of global governance, the law of transnational crime, the law of transnational injury, the law of transnational markets, the law of transnational dispute resolution.

[2] The revival of this concept has been proclaimed through various works of the business (commercial) lawyers after World War II. See Berthold Goldman, "Frontières du droit et 'lex mercatoria'", cited above, as quoted by Peer Zumbansen, "Transnational Law", in Jan Smiths (ed.), *Encyclopaedia of Comparative Law*, Edward Elgar Publishing, 2006, pp. 738-754.

[3] See Peer Zumbansen, "Transnational Law", cited above, p. 746.

transnational because of the mixture of the actors' nature (public and private altogether). This is the case of transnational investment (and public) law[1] that employs the new *lex mercatoria* under the 'umbrella' of investment (and public, my note) law; therefore, the new *lex mercatoria* acquired a new dimension; that is a public law dimension.

Second, both *leges mercatoria* are denationalized by nature; only such nature allows the universalism. The old *lex mercatoria* is to be regarded as genuine body of 'law' consisting of trade customs and principles of law applied in private and commercial areas only. Unlike the old *lex mercatoria*, the new one is contemplated not necessarily and exclusively as an enlarged body of law (international public and private law, any other rules) as Professor Jessup seemed to put it. In the last period of time, the new *lex mercatoria* is contemplated more as a tool of legal theory, or as a tool related to the legal process, or as a methodological tool. These tools are employed for the management of interactions between international law and domestic ones and any other rules, be they *hard* or *soft,* as occurred in cross-border situations involving different actors by their nature (public and/or private). In its 'capacity' of device familiar to the legal theory, or of device familiar to the legal process, or of device familiar to the methodological tool, the new *lex mercatoria* can be employed not only in private law, but also in public law areas (public international law litigation, or human rights litigation). It should be reminded that Professor Jessup apparently employed TL as body of law originally regulating only public international law issues.[2] It is easy to notice that the new *lex mercatoria* can constitute a particular body of law, or a particular tool of legal theory, or a particular legal process, or a particular methodological tool; therefore, the new *lex mercatoria* has been designed

[1] There is no doubt that international investment law is assessed today purely as a version of TL. See Nicolàs M. Perrone, "International Investment Law as Transnational Law", *TLI Think!*, Paper no. 05/2020, available at https://ssrn.com/abstract=3523632, last visited on 20 December 2020.

[2] These public international law issues amount mainly to the investment activities involving the States - acting *jure imperii* - and other actors, be they public or private. Therefore, in its seminal essay simply called 'Transnational Law' (1956), Professor Jessup anticipated the future investment (public) international law; such latter branch of international (public) law had been mainly embodied in the 1960s in the ICSID Convention (1965). See *supra* note 18. It shall not be forgotten that Professor Jessup's TL has been subsequently assessed in the light of 3 (three) approaches: the approach of transnationalized legal traditionalism, the approach of transnationalized legal decisionism and the approach of transnational socio-legal pluralism. See Craig Scott, "'Transnational Law' as Proto-concept: Three Conceptions", vol. 10 (2009), *German Law Journal*, p. 877, available at: http://www.germanlawjournal.com/article.php?id=1147, last visited on 20 December 2020

either to regulate private/commercial and public areas altogether or to be employed in private/commercial and public settings altogether.[1]

Thirdly, the aspiration to universality constitutes the ideological feature of both *lex mercatoria*, be it old and new. The old *lex mercatoria* did not practically experience such aspiration. It seems that the merchants lacked the abilities to put in practice the universalism; or the merchants were not interested in such theoretical topic. Unlike the old *lex mercatoria,* the new one as revived after the Second World War under the 'aegis of the liberal-internationalist doctrine' put in practice the universalism. It seems that the nation-States themselves were paradoxically interested in helping the new *lex mercatoria* to amount to the so-called 'true *lex mercatoria'*; that is the law merchant beyond the State, not without the State, on the one hand, and 'an emerging global commercial law that freely combines elements from national and non-national law', on the other hand.[2] Otherwise speaking, the nation-States did not lack the abilities to put in practice the universalism with a view to revive the new *lex mercatoria*. These abilities have been nurtured by the liberal-internationalists that changed the nation-States' behaviour in the international arena. I stated above the word 'paradoxically' for at least one reason: in the past, nation-States were usually and logically interested in promoting their legal 'products' (national laws or international laws binding by their consent, my note) which are not logically again conceived to be detached from the nation-States themselves. However, after the end of the Cold War, the nation-States entered a new logic, by promoting a commercial 'law' detached from their national legal order. The core of such detachment is based on the liberal-internationalist doctrine that fully permeated the structure of the nations-States after the Second World War.

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[1] As to the idea that the shift to law and globalization blurred the distinction between public and private international law, see Paul Schiff Berman, *supra* note 16, at 520-522. Furthermore, as to the idea that the legal realists do not accept the distinction between public and private domestic law, see Peer Zumbansen, "Where the Wild Things are: Journeys to Transnational Legal Orders, and Back", *UC Irvine Journal of International, Transnational, and Comparative Law*, vol. 1 (2016), p. 161, available at: https://scholarship.law.uci.edu/ucijil/vol1/iss1/8 , last visited on 20 December 2020

[2] See, for instance, the article published by Ralf Michaels in 2007, *supra* note 5 at page 15, pp. 447-468. It seems to me that the author considers the (true) *lex mercatoria* as nothing else than the global commercial law. In my view, it is more cautious to not equate the *lex mercatoria,* even 'true', to the so-called 'global (commercial) law'. My idea is to be developed in my future research papers. Anyway, it appears that the notions of 'global law' and 'transnational law' are quite different. The so-called 'global law' consists of 'the universal legal norms that are being created and diffused globally in different legal domains'; TL consists of 'the legal norms that cross borders and thus apply to parties located in more than one jurisdiction, but may or may not be global in nature'. See for instance, Gregory Shaffer, "Transnational legal process and State change: opportunities and constraints", *IILJ* Working Paper 2010/4, pp. 1-43, available at www.iilj.org, last visited on 20 December 2020.

Therefore, this (new) commercial 'law' is the new *lex mercatoria* detached also from the Westphalian model of the world.[1] Anyway, in the light of the above-mentioned ideas, the so-called discipline, if any, 'TL' 'as a combination of public and private law, international and domestic law is understood as universal and plural at the same time'.[2] Still, one should not forget not to mix up the new *lex mercatoria* and the so-called 'new *new* lex mercatoria', respectively the so-called (my suggestion) 'the newest lex mercatoria'. The new *lex mercatoria* 'reflects the functional differentiation of world society; it is a law for commerce, not for merchants (as it was the old *lex mercatoria*, my note)'.[3] In my opinion, the new *new lex mercatoria* amounts to the post-modern transnational commercial law; the new *new lex mercatoria* is to be assessed as an advanced stage of the new *lex mercatoria* emerged after the Second World War. Both new and new *new lex mercatoria* are logically based on the core idea of the denationalized commerce. Such latter idea evolves its 2 (two) versions. The first dimension (the new *lex mercatoria*) focuses on the merchants only; in my view, that is the subjective approach of the denationalized commerce. The second idea (the new *new lex mercatoria*) focuses on the commerce itself; in my view, that is the objective approach of the denationalized commerce. The newest *lex mercatoria*, if any, amounts to the post-post-modern transnational commercial 'law', namely the 'law' of the worldwide merchants' common sense. The post-post-modern transnational commercial 'law' truly constitutes the oldest *lex mercatoria*, may be fully reloaded; otherwise speaking, the future *lex mercatoria,* that is the post-post-modern *lex mercatoria*, constitutes the revived (commercial) past embodied by the oldest *lex mercatoria* itself. As already stated, the so-called 'magic circle' of *lex mercatoria* can be closed. It can be closed because

[1] In the first quarter of the 21st century, 'a shift from what we called a Westphalian model of the world to a globalized understanding of the world' smoothly occurred. See Ralf Michaels, "Law and Globalisation: Law Beyond the State", in Reza Banakar, Max Travers (eds.), *Law and Social Theory*, 2nd edition, Hart Publishing, 2013, pp. 287-303, as quoted by Ralf Michaels himself in "Transnationalizing Comparative Law" (2015), available at https://scholarship.law.duke.edu/faculty_scholarship/3563, last visited on 20 December 2020.

[2] Under the umbrella of TL, 'presumed universal (international) law is always partial - because it remains distinct from domestic law, but also because it interacts with domestic circumstances in site-specific ways. Global law is always plural but interconnected: local law transcends boundaries and interacts with law elsewhere in complex ways'. See Ralf Michaels, "Beyond Universalism and Particularism in International Law- Insights from Comparative Law and Private International Law" (Online Symposium: Anthea Roberts' *Is International Law International?*), Boston University Law Review Online, vol. 99 (2019), pp. 18-21.

[3] The notion of 'the new *new lex mercatoria'* had been doctrinally contemplated by Ralf Michaels, "The True Lex Mercatoria: Law Beyond the State", cited above, p. 466 in light of a specific writing, namely the writing of Gunther Teubner, *Global Bukovina: Legal Pluralism in the World-Society*, cited above, pp.3-28.

the oldest *lex mercatoria* 'opens' the circle; the newest *lex mercatoria* 'finishes' it.

The circle is perfectly described, as the oldest and the newest *lex mercatoria* are relying on the same core basis. That is the so-called 'merchants' common sense'. In other words, the true source of both *lex mercatoria,* be it the oldest or the newest, is the merchants' common sense. The oldest *lex mercatoria* is based on such common sense because of its status. Let us recall that the oldest *lex mercatoria* is a constitutive part of the *jus gentium* that was mixed up, according at least to Cicero, with the 'law' of nature. The common sense is the underlying idea of *jus gentium*; the common sense is logically the underlying idea of the oldest *lex mercatoria* that is a constitutive part of the *jus gentium* itself. I have already stated why the newest *lex mercatoria* - a truly post-post-modern transnational commercial 'law' -, is based on the merchants' common sense. I just only note that the post-post-modern worldwide merchants employ their common sense with a view to detach their business activity from any 'regulation' provided by the post-modern *lex mercatoria*, thus creating the new *lex mercatoria* evolved subsequently to the Second World War.

To sum up, one should conclude that the ***oldest*** *lex mercatoria* had been 'conceived' as transnational through the geographical lens only; it lacked the methodological approach. The old *lex mercatoria* had been also conceived by the medieval merchants as transnational through the geographical lens only; it lacked also the methodological approach. The new *lex mercatoria* had been conceived by the modern business community as transnational through the extra-geographical lens. Afterwards, it acquired a methodological approach especially in the light, for instance, of the investment and (public, my note) international law. The ***newest*** *lex mercatoria,* if any, lacks both the geographical and methodological approaches. It lacks these approaches because of the core idea of the ***newest*** *lex mercatoria,* if any, concentrating the post-post-modern merchants' common sense and human reason. Such common sense and human reason can be assessed neither geographically nor methodologically. The 'lights' and/or the 'shadows' of globalization encourage the lack of the abovementioned approaches. Furthermore, these 'lights' and/or 'shadows' are blurring up the distinction between cross-border commercial law and cross-border non-commercial law; at least this distinction remains, generally speaking, entirely symbolical. It should be also noted another idea, on the volatile meaning of the so-called notion of

'globalization'.[1] Such latter compression of time and space amounts to a lack of distinction between the 'public' and 'private' life of international law itself.[2] Otherwise speaking, the international law in the post-post-modernity reminds all of us of its ancestor usually called *'jus gentium'* by the Romans. *Jus gentium* did not experience the distinction between public and private international law.[3]

5. Final Remarks

The post-post-modernity that we are living today reminds all of us that TL, at least in its commercial approach and origin(s), is neither old or new, nor oldest or newest. Under the 'umbrella' of post-post-modernism, it is frankly about TcL; in other words, it is TcL just like that. The newest *lex mercatoria,* if any, shares the same core idea which the oldest *lex mercatoria*, namely the worldwide merchants' common sense in doing business. Furthermore, the newest *lex mercatoria* is a 'law' beyond the nation-States; it lives without the nation-States but not without the worldwide merchants' common sense.[4] Furthermore, it fully lives within the so-called 'world commercial society'. Because of the aforementioned same core idea, the so-called 'circle, if any, of post-post-modern TL', as regarded this time in its exclusively commercial

[1] Let the readers be reminded of the suggested meaning of the notion of 'globalisation', 'understood here as the specific compression of time and space which coincides with late modernity'. See Anthony Giddens, *The Consequences of Modernity,* Cambridge, Polity Press, 1991, pp. 63-65.

[2] Joseph Story, universalist by his very nature, fully trusted the unity of international law (public and private altogether). Still, Joseph Story shared a specific and positivist approach to territorial jurisdiction. Such parochial character to territorial jurisdiction 'sowed the seeds for the isolation of private international law from the body of public law'. That is a paradoxical situation: Story's universalism amounts to the isolation of the private 'element' of international law from the 'public' element of international law itself. See Joel R. Paul, ""The Isolation of Private International Law", cited above, p. 161. In the first quarter of the 21st century, the distinction between public and private international law remained also symbolically. It remained as such because of the neoliberal ideology powerfully arising out of the emerging realities occurring after the end of the Cold War. The latter ideology 'asserts the superiority of private law in regulation of international commerce'. See Claire Cutler, "Artifice, Ideology and Paradox: The Public/Private Distinction in International Law", *Review of International Political Economy*, vol. 4 issue 2 (1997), pp. 261-285. I dare to affirm that the superiority, if any, of private law, covers all its 'legal' components, including (even mainly) the so-called 'soft law' amounting to the relative normativity. In the age of neoliberalism, this kind of relativity is permeating the international and domestic settings altogether; furthermore, this kind of relativity amounts to the mixture of international and domestic settings. In other words, each of these settings is losing its clear and firm identity under the 'umbrella' of transnationalism.

[3] The so-called origin of international law, that is the *jus gentium,* had been applicable to all persons (including the merchants, my note) and 'generally covered commercial relations'. See Joel R. Paul, "The Isolation of Private International Law", cited above, p. 156.

[4] In Ralf Michaels' vision, the new *lex mercatoria* – that is the 'true' *lex mercatoria,* is a 'law' beyond the State, but not without the State. See Ralf Michaels, *supra* note 2 at page 18, pp. 447-468. I recall that the 'true' *lex mercatoria* is familiar to the neo-liberal doctrinal ideology emerged in the neo-liberal post-modernity.

dimension, is fully and perfectly closed. Such perfect 'circle' is to be also regarded as an appropriate vehicle driving us 'to understand law in (post-post-modern, my note) context'.[1]

The latter context does not meet anymore various substantive and formal separations. Separations such as the one between public and private international law, as firmly emerged in the time following the Peace of Westphalia (1648); or the one of public and private law emerged under the auspices of the Modern (Liberal, my note) Age of Industrialization; or the 'vertical' and substantive separation of public and private actors emerged under the auspices of the same Age of Industrialization (this latter one substantively undermined under the auspices of the post-modern (neoliberal, my note) Age of Digitalization; or the substantive and formal 'horizontal', and/or 'vertical', and/or 'heterarchical' separation between all the constitutive elements of the (post-post, my note)-modern law as a whole arising out of the post-post-modern realities from nowadays. The latter realities are to be regarded as the core of the so-called 'Age of common sense' that the merchants are seeking to fully live today.

In other words, the post-post-modern (and commercial, my note) Age should be regarded as the Age of true merchants' common sense. The merchants' common sense amounts to the 'law' of nature involving the universality of *jus gentium*. Under the 'umbrella' of their common sense, if any, there are neither 'horizontal'/'vertical' nor 'heterarchical' separation between normative and non-normative realities.[2] Ironically in an apparent way,[3] only the post-post-modern nowadays context drives us to the past. In the past I am finding the ancestor of the positivist international law; that is *jus gentium* itself. Therefore, the post-post-modern Age of law meets at any point in that circle's perimeter the first Age of the 'law' (*jus gentium* itself). *Jus gentium*

[1] On the occasion of conceptualizing 'economic law', the words '(…) understanding as law in context' had been employed. See Peer Zumbansen, "What is Economic Law?", *TLI Think!* Paper 20/2020, available at SSRN: https://ssrn.com/abstract=3660836 or http://dx.doi.org/102139/ssrn3660836, last visited on 20 December 2020. In the 2010s, I, myself, spread the idea of 'Understanding (commercial) law in (post-post-modern) context)'. Such idea constitutes the core of my doctrinal idea or, to put it more directly, of my doctrinal ideology of the scholarly pragmatism living in my writings.

[2] I doctrinally 'borrowed' the idea of 'three-dimensional' from Friedrich Juenger's studies and articles on the issues regarding conflict of laws and the so-called 'challenges of Europeanization'. See Christian Joerges, "The idea of a three-dimensional conflicts law as constitutional form", *RECON* Online Working Paper 2010/05, URL: www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html, last visited on 20 December 2020. See also Christian Joerges, "The Challenges of Europenization in the Realm of Private Law: A Plea for a New Legal Discipline", (2004), available at SSRN: https://ssrn.com/abstract=635387 or http://dx.doi.org/10.2139/ssrn.635387, last visited on 20 December 2020.

[3] I worded 'ironically in an apparent way' as, in my vision, the whole mankind constitutes a truly perfect and round 'circle'.

did not experience either 'horizontal'/'vertical', or 'heterarchical' separation amond its constitutive elements. The post-post-modern Age of commercial law embodied in the newest *lex mercatoria* also does not experience such separation(s); the 'circle' of the mankind and its newest but oldest commercial 'law' – that is the newest *lex mercatoria*, is perfectly closed. Such perfection is based on a paradox: the oldest and newest dimensions of *lex mercatoria* are living at the same time in light of normative, respectively non-normative realities altogether.

The lack of the aforementioned separation(s), including 'vertical' separation, does not preclude the legal scholars to be and remain scientifically objective when analysing transnationalism or internationalism or nationalism trends in legal thinking. As far as I am concerned, notwithstanding my inherent subjectivity, I am striving to do my utmost; that is to objectively be and remain so through drafting my research papers, including the present one.

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Bibliography

Books

Anthony Giddens, *The Consequences of Modernity*, Cambridge, Polity Press, 1991;

Eric Loquin, Catherine Kessedjian (eds.), *La mondialisation du droit*, Paris, Litec, 2000;

François Rigaux, *Droit Public et droit privé dans les relations internationales*, A. Pédone, 1977 ;

Guenther Teubner (ed.), *Global Law without a State,* Taylor and Francis Ltd. (Dartmouth Publishing Co. Ltd), 1996;

Herbert Felix Jolowicz, *Roman Foundations of Modern Law*, Oxford: Clarendon Press; Oxford University Press, 1957;

Horatia Muir Watt, Lucia Bízíková, Agatha Brandão de Oliveira, Diego P.Fernández Arroyo, *Global Private International Law. Adjudication without frontiers,* Edward Elgar Publishing, 2019;

Jan Smiths (ed.), *Encyclopaedia of Comparative Law*, Edward Elgar Publishing, 2006;

Peer Zumbansen (ed.), *The Many Lives of Transnational Law. Critical Engagements with Jessup's Bold Proposal,* Cambridge University Press, 2020;

Philip C. Jessup, *Transnational Law,* Yale University Press, New Haven, 1956;

Richard P. Appelbaum, William L. F. Felstiner, Volker Gessner, *Rules and Networks*, Hart Publishing, 2001;

Reza Banakar, Max Travers (eds.), *Law and Social Theory,* 2nd edition, Hart Publishing, 2013;

Roy Goode, Herbert Kronke, Ewan McKendrick (eds.), *Transnational Commercial Law. Texts. Cases and Materials,* 2nd edition, Oxford University Press, 2015;

Articles

Alain Pellet, "La lex Mercatoria, Tiers ordre juridique ? Remarques ingénues d'un internationaliste de droit publique", in *Souveraineté Étatique et Marchés Internationaux à la fin du siècle, Mélanges en l'honneur de Philippe Kahn*, Paris, Litec, 2000, pp. 53-74;

Alex Mills, "The Private History of International Law", *International and Comparative Law Quaterly,* vol. 55, no. 1 (January 2006), pp. 1-50;

Barak Richman, "How Communities Create Economic Advantage: Jewish Merchants in New York", Law & Soc. Inquiry, vol. 31, no. 2 (2006), pp. 383-420;

Bernardo M. Cremades, Steven L. Plehn, "The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions", B.U. International Law Journal, vol. 2 (1984) pp. 317 -ss;

Berthold Goldman, "Frontières du droit et 'lex mercatoria' ", *Archives de Philosophie du Droit*, vol. 9 (1964), pp. 177-192;

Boaventura de Sousa Santos, "Law: A Map of Misreading Towards a Postmodern Conception of Law", J.L. & SOC'Y vol. 14 (1987), p. 279-302;

Carol Harlow, "'Public' and 'Private' Law: Definition without Distinction", Mod. Law Review vol. 43 (1980) pp. 241-ss;

Christian Joerges, "The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline", 2004, available at SSRN: https://ssrn.com/abstract=635387, last visited on 20 December 2020;

Christian Joerges, "The idea of a three-dimensional conflicts law as constitutional form", RECON Online Working Paper 2010/05, May 2020, URL: www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html, last visited on 20 December 2020;

Claire Cutler, "Artifice, Ideology and Paradox: The Public/Private Distinction in International Law", *Review of International Political Economy*, vol. 4, issue 2 (1997), pp. 261-285;

Covington & Burling LLP, *Public International Law* (2006), available at http://www.cov.com/download/contentbrochures/publicinternationallaw.pdf, last visited on 20 December 2020;

Craig Scott, "'Transnational Law' as Proto-concept: Three Conceptions", *German Law Journal*, vol. 10 (2009), available at http://www.germanlawjournal.com/article.php?id=1147, last visited on 20 December 2020;

Daniela Caruso, "Private Law and State-Making in the Age of Globalization", *New York University Journal of International Law and Politics*, vol. 39, no.1 (2006), Boston Univ. School of Law Working Paper No. 06-09, available at SSRN: https://ssrn.com/abstract=900106, last visited on 20 December 2020;

Edith Brown Weiss, "The Rise or the Fall of International Law?", *Fordham Law Review* vol. 69 (2000), pp. 345-ss, available at: https://ir.lawnet.fordham.edu/flr/vol69/iss2/2, last visited on 20 December 2020.

Emmanuel Gaillard, "Transnational Law: A Legal System or a Method of Decision Making?", *Arbitration International*, volume 17, no.1 (2001), pp. 59-71;

Eric Loquin, Laurence Ravillon, "La volonté des operateurs vecteur d'un droit mondialisé", in E. Loquin, C. Kessedjian (eds.), *La mondialisation du droit*, Paris, Litec, 2000, pp. 91-132;

Francesco Galgano, "The New Lex Mercatoria", *Ann. Surv. INT'L & COMP.L.,* vol. 2 (1995), p. 99 – ss;

Friedrich Juenger, "The Lex Mercatoria and Private International Law", *Louisiana Law Review*, vol. 60 no. 4 (2000), pp. 1133-1150;

Graf-Peter Calliess, "The Making of Transnational Contract Law", *Indiana Journal of Global Legal Studies*, vol. 14, iss. 2, (2007), article 12, pp. 469-483, available at https://www.repository.law.indiana.edu/ijgls/vol14/iss2/12, last visited on 20 December 2020;

Gunther Teubner, *"*Global Bukovina: Legal Pluralism in the World-Society", in Guenther Teubner (ed.), *Global Law without a State,* Taylor and Francis Ltd. (Dartmouth Publishing Co.Ltd), 1996, pp. 3-28, available at: https://ssrn.com/abstract=896478, last visited on 20 December 2020;

Gregory Shaffer, "Transnational legal process and state change: opportunities and constraints", *IILJ* Working Paper 2010/4, pp. 1-43, available at www.iilj.org, last visited on 20 December 2020;

Harold J. Berman, Colin Kaufman, "The Law of International Commercial Transactions (Lex Mercatoria)", *Harvard International Law Journal*, vol. 19 (1978), pp. 221, 224-29;

Harold J. Berman, "World Law", *Fordham International Law Journal*, vo. 18 (1994), pp. 1617-1622, available at: https://ir.lawnet.fordham.edu/ilj/vol18.iss5/4, last visited on 20 December 2020;

Harold Hongju Koh, "Why Do Nations Obey International Law?", *The Yale Law Journal*, vol. 106 (1996-1997), pp. 2599-2659;

Harold Hongju Koh, "Why Transnational Law Matters", *Penn State International Law Review*, vol. 24, no. 4 (2005), pp.745-754, available at: http://elibrary.law.psilr/vol24/iss4/4, last visited on 20 December 2020;

John Griffiths, "What is Legal Pluralism?", *The Journal of Legal Pluralism and Unofficial Law*, volume 18, issue 24, (1986), pp. 1-55;

Joel R. Paul, "The Transformation of International Comity", *Law and Contemporary Problems*, vol. 71 (Summer 2008), pp. 19-38, available at https://scholarship.law.duke.edu/lcp/vol17/iss3/2, last visited on 20 December 2020;

Joel R. Paul, "The Isolation of Private International Law", *Wisconsin International Law Journal*, vol. 7 (1988), available at http://repository.uchastings.edu/faculty_scholarship/630, last visited on 20 December 2020;

Joel R. Paul, "Holding Multinational Corporations Responsible under International Law", *Hastings International Law & Comparative Law Review,* vol. 24 (2001), available at https://repository.uchastings.edu/faculty_schlarship/623, last visited on 20 December 2020;

Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?", *American Journal of International Law,* vol. 95 (2001), pp. 535-578;

Lester M. Salamon, "The New Governance and the Tools of Public Action: An Introduction", *Fordham Urb. Law Journal,* vol. 28 no. 5 (2001), pp. 1611-1674;

Mark Janis, "Sovereignty and International Law: Hobbes and Grotius", in R. St. J. Masdonald (ed.), *Essays in Honour of Wang Tieya*, Brill | Nijhoff, 1994, pp. 391-400;

Mathias Reiman, "From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum", *Penn State International Law Review*, vol. 22, no. 3, (2004), pp. 397-415, available at: http://elibrary.law.psilr/vol22/iss3/3, last visited on 20 December 2020;

Martti Koskenniemi, Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties", *Leiden Journal of International Law*, vol. 15 (2002), pp. 553-579;

Nicolàs M. Perrone, "International Investment Law as Transnational Law", *TLI Think!* Paper 05/2020, available at https://ssrn.com/abstract=3523632, last visited on 20 December 2020;

Peer Zumbansen, "Why Global Law is Transnational: Remarks on the Symposium around William Twinning's Montesquieu Lecture", *Transnational Legal Theory* vol. 4 issue 4 (2013), pp. 463-475;

Peer Zumbansen, "The Parallel Worlds of Corporate Governance and Labor Law", *Indiana Journal of Global Studies,* vol. 13, issue 1, (2006), available at: http://www.repository.law.indiana.edu/ijgls/vol13/iss1/9, last visited on 20 December 2020;

Peer Zumbansen, "Happy Spells? Constructing and Deconstructing a Private-Law Perspective on Subsidiarity", *Law and Contemporary Problems*, vol. 79 (2016), pp. 215-238, available at: https://scholarship.law.duke.edu/lcp/vol79/iss2/10, last visited on 20 December 2020;

Peer Zumbansen, "Law after the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law", *Comparative Research in Law & Political Economy*, Research Paper No. 13/2008, available at http://digitalcommons.osgoode.yorku.ca/clpe/187, last visited on 20 December 2020;

Peer Zumbansen, "Transnational Law", in Jan Smiths (ed.), *Encyclopaedia of Comparative Law*, Edward Elgar Publishing, 2006, pp. 738-754;

Peer Zumbansen, "Where the Wild Things are: Journeys to Transnational Legal Orders, and Back", *UC Irvine Journal of International, Transnational, and Comparative Law*, vol. 1 (2016), pp. 161-194, available at: https://scholarship.law.uci.edu/ucijil/vol1/iss1/8, last visited on 20 December 2020;

Peer Zumbansen, "What is Economic Law?", *TLI Think!* Paper no. 20/2020, available at SSRN: https://ssrn.com/abstract=3660836 or http://dx.doi.org/102139/ssrn3660836, last visited on 20 December 2020;

Leo Gross, "The Peace of Westphalia, 1648-1948", *The American Journal of International Law*, vol. 42, no. 1 (January 1948), pp. 20-41;

Lisa Bernstein, "Opting out of the Legal System: Extra-legal Contractual Relations in the Diamond Industry", *J. Legal Studies* vol. 21 no. 1 (1992), pp. 115-157;

Paul Schiff Berman, "From International Law to Law and Globalization", available at SSRN: https://ssrn.com/abstract=700668, last visited on 20 December 2020;

Radu Bogdan Bobei, "Preliminary focus on the various meanings of the term 'transnational law' ", in *Romanian Journal of International Law*, no. 23 / January-June 2020, pp. 7-45;

Ralf Michaels, "The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism", *Wayne Law Review* vol. 51 (2005), 1209-1259;

Ralf Michaels, "The True Lex Mercatoria: Law Beyond the State", *Indiana Journal of Global Legal Studies*, vol.1, iss.2 (2007), pp.447-468;

Ralf Michaels, "Global Legal Pluralism", *Annual Review of Law & Science*, vol. 5 (2009), pp. 1-35;

Ralf Michaels, "The Mirage of Non-State Governance", *Utah Law Review* (2010), pp. 31-45;

Ralf Michaels, "Law and Globalisation: Law Beyond the State, in Reza Banakar, Max Travers(eds.), *Law and Social Theory*, 2nd edition Hart Publishing, 2013, pp. 287-303;

Ralf Michaels, "Transnationalizing Comparative Law", available at https://scholarship.law.duke.edu/faculty_scholarship/3563, last visited on 20 December 2020;

Ralf Michaels, "Beyond Universalism and Particularism in International Law- Insights from Comparative Law and Private International Law" (Online Symposium: Anthea Roberts' Is International Law International?), *Boston University Law Review Online*, vol. 99 (2019), pp. 18-21;

Ralf Michaels, Nils Jansen, "Private Law beyond the State? Europeanization, Globalization, Privatization", in *The American Journal of Comparative Law*, vol. 54, no. 4, (fall 2006), pp. 843-890;

Sandeep Gopalapan, "The Creation of International Commercial Law: Sovereignty Failled?", *San Diego International Law Journal* vol. 5 issue 1 (2004), pp. 267-322;

Stéphanie Beaulac, "The Westphalian Model in defining International Law: Challenging the Myth", Australian Journal of Legal History vol. 8 (20040, pp. 181-213, available at SSRN: https://ssrn.com/abstract=672241, last visited on 20 December 2020;

Stephen D. Krasner, "Sharing Sovereignty: New Institutions for Collapsed and Failing States", *International Security*, vol. 29, no.2 (Fall 2004), pp. 85-120, published by The MIT Press;

Stephen D. Krasner, "The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law", Michigan Journal of International Law vol. 25 no.4 (2004), pp. 1075-1101, available at: https://repository.law.umich.edu/mjil/vol25/iss4/15, last visited on 20 December 2020;

Steve Patton, "The Peace of Westphalia and it Affects on International Relations, Diplomacy and Foreign Policy", *The Histories,* vol.10, issue 1, (2019), available at https://digitalcommons.lasalle.edu/the histories_/vol10/iss1/5, last visited on 20 December 2020;

Van Vechten Veeder, "The Lena Goldfields Arbitration: The Historical Roots of Three Ideas", 1998, 47 *International & Comparative Law Journal* vol. 47 (1998), p. 747-ss;

William Twining, "Globalisation and Legal Scholarship", *Tilburg Law Lectures Series, Montesquieu seminars* vol. 4 (2009), Wolf Legal Publishers in close cooperation with the Tilburg Graduate School of the Tilburg University Faculty of Law, Netherlands, 2009, pp.37-38;

William Twining, "Post-Westphalian Conception of Law", *Law & Society Review*, vol. 37, issue 1 (2003), pp. 199-258;

William Twining, "Normative and Legal Pluralism: A Global Perspective", *Duke Journal of Comparative and International Law*, vol. 20 (2010), pp. 473-ss;

Case law

Swift v. Tyson, 41 US (16 Pet.) 1 (1842).